STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW JUDGE DIVISION

Lack's Outdoor Furniture, Inc., Appellant, v. The Travelers Indemnity Company of Illinois, Respondent.	)	Docket No. 01-ALJ-09-0374-AP **ORDER**

Appearances: Fred B. Newby, Esquire, for the Appellant
J. Calhoun Watson, Esquire, for the Respondent

This matter is before the Administrative Law Judge Division ("Division") pursuant to an appeal from the Order of the Director of the South Carolina Department of Insurance ("Department") dated July 25, 2001. It involves a dispute regarding the application of Class Code 9015 to a portion of the payroll of Lack's Outdoor Furniture, Inc. ("Appellant"). The Department filed the Record on Appeal on September 25, 2001.[1] Appellant filed its brief on October 9, 2001. The Travelers Indemnity Company of Illinois ("Respondent") requested an extension of time to file its brief. After the request was granted, Respondent filed its brief on November 8, 2001.

STATEMENT OF THE CASE

On May 21, 1992, Appellant applied for workers' compensation insurance in the assigned risk market. Respondent was assigned as the carrier with an effective date of June 29, 1992. On Appellant's application for workers' compensation insurance, Appellant's agent classified the payroll

[1] Effective May 1, 2001, ALJD Rule 36 was amended to specify the procedure by which the agency must file the Record with the Division. The rule specifically standardized the content and format of the Record. Although the Department timely filed the Record in this case, the Department failed to file it in compliance with ALJD Rule 36. In the future, the Record will be returned to the Department if it fails to comply with this rule.

in Class Code 8017, which addresses "concessions of beach chairs and umbrellas" but does not take into account any lifeguard duties. The rate for Class Code 8017 is $1.83.

Pursuant to contracts with the City of Myrtle Beach and Horry County, Appellant is required to provide lifeguard services in order to maintain its commercial franchise to rent beach chairs and umbrellas. The application for workers' compensation insurance did not reference the lifeguard duties performed by Appellant's employees nor did it recite the franchise agreement between Appellant and Horry County which requires such lifeguard duties to be performed.

In August 1994, Respondent submitted a Premium Adjustment Notice indicating that the class code of certain payroll would be changed to Class Code 9015, which addresses lifeguard duties. The rate for Class Code 9015 is $5.63. Such reclassification of Appellant's business would increase the workers' compensation insurance premium by an additional $26,969.00 each year.

By letter dated November 10, 1994, Appellant wrote Dean Kruger, Assistant Actuary of the Department, disputing the application of Class Code 9015. By letter dated March 14, 1995, Mr. Kruger found that such classification was improper, and that the proper classification was Class Code 8017 based on the fact that lifeguard exposure was minimal.

Four months later on July 24, 1995, Respondent provided two claims submitted by Appellant's employees in connection with their lifeguard duties and again requested that the classification be changed. By letter dated September 3, 1995, Mr. Kruger authorized Respondent to change the Class Code from 8017 to 9015.

2. On September 19, 1995, Appellant responded to the letter of July 24, 1995, and the change in classification as a result of the letter of September 3, 1995. Appellant also indicated its intent to appeal the change in classification. By letter dated October 9, 1995, Mr. Kruger indicated that his decision was based on data supplied by Respondent, and that the appropriate recourse for Appellant would be to file an appeal with Alicia Clawson, Deputy Director and Executive Assistant to the Department's Director, Lee P. Jedziniak. On October 23, 1995, Appellant appealed the Department's staff decision and requested a public hearing. After notice, a public hearing was conducted on April 29, 1996, by Ms. Clawson, who sat as the hearing officer for the Department.

On June 1, 1999, approximately three years later, Ms. Clawson issued a report indicating the reclassification as Class Code 9015 was proper and would be effective from the date of her report.

On July 25, 2001, Ernst N. Csiszar, the Director of the Department, issued the Final Order wherein he concluded that the reclassification was properly applied to Appellant's payroll. Appellant appealed the Director's Order on August 24, 2001.

ISSUES ON APPEAL

Procedural and Statutory Issues

1. Whether Dean Kruger's letters of September 3, 1995, and October 9, 1995, are arbitrary and capricious, violate S.C. Code Ann. § 1-23-320, or violate due process;
2. Whether Dean Kruger's letters of September 3, 1995, and October 9, 1995, violate S.C. Code Ann. § 38-73-490 and S.C. Code Ann. § 38-73-495; and
3. Whether the Final Order, dated July 25, 2001, violates S.C. Code Ann. § 38-73-495.

Constitutional Issues

4. Whether the use of NCCI's classification system constitutes an improper delegation of executive power;
5. Whether the "interchange of labor rule" violates due process; and
6. Whether S.C. Code Ann. § 38-73-495 denies Appellant's due process and equal protection by failing to provide objective standards.

STANDARD OF REVIEW

S.C. Code Ann. § 38-3-210 (Supp. 2001) provides in pertinent part:

> Any order or decision made, issued, or executed by the director or his designee is subject to judicial review in accordance with the appellate procedures of the South Carolina Administrative Law Judge Division, as provided by law. An appeal from an order or decision under this section must be heard in the Administrative Law Judge Division, as provided by law.

The Administrative Law Judge reviews the Director's final decision in the same manner and has the same authority as prescribed in § 1-23-380(A) for circuit court review of final agency decisions. S.C. Code Ann. § 1-23-380(B) (Supp. 2001). The Administrative Law Judge, therefore, must not substitute its judgment for that of the Director as to the weight of the evidence. The judge, however,

may reverse or modify the decision if the administrative findings, inferences, conclusions, or decisions are:

> (a) in violation of constitutional or statutory provisions;
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> (b) in excess of statutory authority of the agency;
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> (c) made upon unlawful procedure;
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> (d) affected by other error of law;
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> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
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> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2001); see Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).

FACTS

Appellant is a South Carolina corporation owned by George W. Lack and Linda C. Lack of Myrtle Beach, South Carolina. Appellant's principal place of business is Horry County, South Carolina, where it is engaged in the manufacture, sale, and leasing of beach-related furniture. Appellant specifically leases wooden beach chairs, beach umbrellas, and cabanas to the public on various portions of the public beaches in and around Myrtle Beach. In 1992, Appellant purchased workers' compensation insurance from Respondent.

The dry sand beaches in South Carolina are owned by private owners in some areas and by public entities in others. It is generally conceded that public entities have the authority to exercise general police powers over the beaches. Horry County and the City of Myrtle Beach have undertaken to regulate commercial activities on the public beaches within their jurisdiction and, as part of that regulation, have instituted a general scheme of granting commercial franchises for specific areas of the beach. Appellant is one of five franchisees in the City of Myrtle Beach and is one of several franchisees in the unincorporated areas of the county.

Pursuant to the various franchise agreements, the activities of the franchisees are strictly limited. They are allowed to rent to the public their chairs, umbrellas, and cabanas, and in certain

areas, are allowed to sell some refreshments. Each of the franchise agreements requires the franchise operator to provide lifeguard services in their areas of operation. This is accomplished by having the beach service employees qualified as lifeguards.

Appellant's employees rent the equipment and collect the rental fees during the day and turn the receipts into Appellant each evening. This rental of equipment is the sole source of income for the beach services and the employees are paid from the rental receipts. While on duty, the employees are supposed to supervise the beach area, watch the swimmers, and provide lifeguard services and water rescue when needed. Only a minimal amount of the time on duty is spent executing water rescues[2] while the majority of the time is used for the concession and rental business.

DISCUSSION

Procedural and Statutory Claims

The procedural and statutory issues raised by Appellant are based on two assumptions: (1) Mr. Kruger's March 14, 1995 letter is a "final agency decision"; and (2) Appellant should not have to pay for lifeguard exposure because the amount of time that Appellant's agents spend on lifeguard rescues is a small fraction of that spent on beach chair concessions. Both lack merit.

A. Mr. Kruger's prehearing correspondence

Appellant argues that Mr. Kruger's March 14, 1995 letter is a "final agency decision," which can be appealed and thus affords Appellant procedural and statutory arguments concerning Mr. Kruger's letter of September 3, 1995, and October 9, 1995. None of the letters written by Mr. Kruger constituted "final agency decisions"as defined in S.C. Code Ann. § 1-23-350 (Supp. 2001). The letters, therefore, do not offer Appellant an opportunity for review. All were staff determinations from which Appellant could request a "public hearing" or a "contested case hearing."

Nothing in the Code of Laws of South Carolina or the Department's regulations supports Appellant's claim that the letters are final agency decisions in a contested case from which appeals could be taken. The applicable insurance regulation provides that a decision does not become final

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[2] In 1993, 1994, and 1995, thirty-five ten-thousandths percent (0.0035%), forty-seven ten-thousandths percent (0.0047%), and thirty-five ten-thousandths percent (0.0035%), respectively, of Appellant's business hours consisted of executing water rescues.

until the Chief Insurance Commissioner has reviewed the exceptions, records, the presiding officer's report, and issued a written order. 25A S.C. Code Ann. Regs. 69-31-ZZ (1976). Mr. Kruger was not the Director of the Department. The Department's decision, therefore, only became final when the Director issued his Order on July 25, 2001.

Similar to cases involving other state agencies, the letters by staff simply served as an initial method to define the issues, and obviously, was the first step of many available to and used by the Appellant. Appellant was given a fair opportunity to present its evidence and to challenge Respondent's evidence at the contested case hearing conducted by Ms. Clawson. Appellant participated in that hearing and had every opportunity to contest the letters of Mr. Kruger at that time, to cross-examine him, and present Appellant's opinion for consideration and review.

Since Mr. Kruger's letters were not final agency decisions, Appellant's claims of statutory and procedural errors fail. There was no statutory or regulatory requirement to provide notice to Appellant before Mr. Kruger issued the letters. In addition, there was no requirement by the Department to provide notice of appeal of those letters within thirty days after their issuance as required by the Administrative Procedures Act ("APA") in contested case hearings. Further, Appellant's claim that Mr. Kruger's letters failed to explain the position of the Department is without merit. Appellant had notice of the hearing in 1996 and participated fully.

As to any prejudice suffered by Appellant due to a change in the Department's position as expressed in the two letters, Appellant's participation in the hearing allowed it to advance its position fully before th hearing officer. This argument is without merit.

Mr. Kruger's letters were initial letters by the Department outlining its position. They only notified Appellant of the position of the Department. Appellant thereafter proceeded pursuant to the APA to request a contested case hearing or public hearing, advocate its positions, and seek a final decision from the agency. From that final decision Appellant had the right to appeal to the Division. Such procedure was followed and no procedural or statutory errors have been shown.

Further, no procedural due process violation has been shown. For the above reasons stated, i.e., opportunity for a hearing, opportunity to present testimony and offer evidence and to submit a post-hearing brief and a proposed order, Appellant was provided all allowable due process.

Appellant appealed the Final Order of the Department to the Division and may now appeal this decision on appeal to circuit court pursuant to S.C. Code Ann. §§ 1-23-380 and 1-23-610.

Since the Final Order was issued by the Director, no premium has been collected as a result of the letters issued by Mr. Kruger. Appellant has not suffered any erroneous deprivation, economic or otherwise, as a result of the letters. The substantive and procedural safeguards afforded the Appellant are numerous, and it has not met its burden to show a due process violation.

B. Director's Final Order

Appellant also argues that the Final Order issued by the Director on July 25, 2001, violates the provisions contained in S.C. Code Ann. §§ 38-73-490 and 38-73-495 (Supp. 2001), which require that workers' compensation rates must be "fair, reasonable, adequate, and nondiscriminatory." Further, Appellant assumes that providing lifeguard exposure should not generate an additional premium because its employees spend only a small fraction of time on lifeguard rescues, i.e., 0.0035% to 0.0047%. Appellant posits that none of the workers' compensation carriers for the period from 1974 through 1991 have paid many claims and those paid have related almost exclusively to injuries arising out of the beach equipment rental activities.

Appellant concedes that it is required by its contract with the City of Myrtle Beach and Horry County to provide lifeguard services in exchange for its commercial franchises. Appellant also concedes that its employees provide life guarding services for the entire time they are on duty, i.e., from 8:00 a.m. to 5:00 p.m. each day. Appellant further concedes that all its employees are required to be certified lifeguards and wear shirts with the words "Lifeguard" stamped on the back.

Class Code 8017, entitled "Phraseology-Store: Retail NOC," provides that this classification applies to "concessions, such as . . . rolling chairs on boardwalks, beach chairs, and beach umbrellas."

Class Code 9015, entitled "Phraseology: Buildings-Operation by Owner or Lessee," is applicable to buildings operated by owners or lessees of office, apartment, tenement, mercantile, or industrial buildings. It encompasses all superintendents, custodial and maintenance operations conducted by an owner or lessee of a building. It further applies to a bathhouse-beach and camp operation, which for classification purposes, is generally considered to be an enterprise providing recreational activities that are principally outdoor in nature for individuals who partake of the camp's

services on a temporary basis. This classification also covers "lifeguards and swimming instructors at municipal or public pools."

Rule IV(E)(2) of the Basic Manual for Workers Compensation and Employers Liability Insurance ("Manual"), addresses situations involving an employee who performs duties related to more than one classification. This is called the "Interchange of Labor" rule, which provides "[s]ome employees, who are not miscellaneous employees, may perform duties directly related to more than one classification. . . . When there is such an interchange of labor, the entire payroll of employees who interchange shall be assigned to the highest rated classification representing any part of their work."[3] Rule IV(D)(3) of the Manual, entitled "Business Not Described by a Manual Classification," provides that "[i]f there is no classification which describes the business, the classification which most closely describes the business shall be assigned."

David Cavanaugh, Underwriting Product Manager for the National Council on Compensation Insurance ("NCCI") and the person responsible for maintaining and updating the Manual, testified at the hearing that payroll of Appellant's employees cannot be segregated to take into account separate duties of employees since the employees are performing both their lifeguard and beach chair concession duties at the same time.

Appellant, however, argues that its employees perform their beach chair concession duties 99.995% of time and that the lifeguard duties only have the potential to be performed 0.0047% of the time. Appellant further argues that performing lifeguard duties is not the primary business and that the loss risk by the carrier is extremely small. Thus, Appellant seeks to quantify the time spent by its employees to establish a fair and reasonable premium to be paid. However, there is no provision in the Manual for such. Since Appellant's employees were engaged at all times both in beach equipment concessions and lifeguard duties, Appellant's argument that "the interchange of labor" rule does not secure "fair, reasonable, adequate, and non-discriminatory rates" fails. This case is an excellent example of the applicability of the "interchange of labor" rule.

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[3] The Basic Manual for Workers Compensation and Employers Liability Insurance, including the "interchange of labor" rule, was approved by the Department pursuant to S.C. Code Ann. § 38-73-520 (Supp. 2000).

For the reasons stated herein, the Final Order of the Director dated July 25, 2001, does not violate S.C. Code Ann. §§ 38-73-490 and 38-73-495.

Constitutional Claims

Appellant challenges the Final Order of the Director on several constitutional grounds, including due process and equal protection. For the reasons set forth below, these arguments also fail.

When due process is analyzed, it must be considered in the context of procedural due process and substantive due process. Procedural due process addresses procedure and requires that certain procedural safeguards be observed before depriving an individual of property. United States v. James Daniel Good Real Property, 510 U.S. 43 (1993). The fundamental protection provided by procedural due process is the opportunity to be heard "at a meaningful time in a meaningful manner." Matthews v. Eldridge, 424 U.S. 319 (1976).

Procedural due process is a "flexible concept." The required procedures vary depending upon the importance attached to the interest being terminated and the circumstances under which the deprivation may occur. Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1905). The purpose is to ensure fair play and to protect an individual's "use and possession of property from arbitrary encroachment–to minimize substantively unfair or mistaken deprivations of property." Fuentes v. Shevin, 407 U.S. 67 (1972).

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Substantive due process addresses the substance of the process and is considered more than a procedural safeguard. It "reaches those situations where a deprivation of life, liberty, or property is accomplished by legislation which can, given even the fairest procedure in application to individuals, destroy the enjoyment of all three." Poe v. Ullman, 367 U.S. 497 (1961). Thus, it requires that a law shall not be unreasonable, arbitrary, or capricious and that the means selected have some relation to the object sought to be obtained. McMahan v. International Ass'n of Bridge, Structural & Ornamental Ion Workers, 858 F. Supp. 529 (D.S.C. 1994). When a statute is challenged under a substantive due process claim, a reviewing court only requires that the act be reasonably designed to accomplish its purpose, unless some fundamental right or suspect class is

involved. State v. Hornsby, 484 S.E.2d 869 (1997). The burden of showing that a statute is unreasonable falls on the party who attacks it on due process grounds.

The test of constitutionality in the context of substantive due process is not whether the legislature was wise or fair in the economic sense in enacting legislation, but simply whether the statute is rational. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976). Moreover, a legislative act will not be declared unconstitutional unless its repugnance to the Constitution is clear and beyond a reasonable doubt. Legislation adjusting the burdens and benefits of economic life comes to the court with a presumption of constitutionality, and one complaining of a substantive due process violation must establish that the legislature has acted arbitrarily and irrationally. McMahan, at 548 (citing Usery v. Turner Elkhorn Mining Co.).

Finally, the purpose of the Equal Protection Clause is to prevent the government from making improper classifications. McMahan. The Equal Protection Clause concerns itself with preventing unconstitutional discrimination by the states. Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel, 20 F. 3d 1311 (4th Cir. 1994). It does not require that each person must be treated the same; however, it does require that all persons similarly situated be treated alike. Faulkner v. Jones, 858 F. Supp. 552 (D.S.C. 1994).

Courts apply different standards of review depending on the classification and right involved. A rational basis standard of review is employed in all cases, except those involving a suspect class (race, national origin, gender, illegitimacy) or a fundamental right (interstate travel, marriage/family rights, voting, access to justice). Since this case does not involve a suspect class or a fundamental right, the standard for evaluating the constitutionality is "mere rationality." In other words, the "court must determine whether there is some rational relation between the statute's creation of a class and a legitimate legislative objective." McMahan, at 550.

Our court follows the same rule in cases involving the Equal Protection Clause under either the United States or the South Carolina constitutions. To satisfy Equal Protection, a classification must (1) bear a reasonable relation to the legislative purpose sought to be achieved, (2) members of the class must be treated alike under similar circumstances, and (3) the classification must rest on some rational basis. D. W. Flowe & Sons, Inc. v. Christopher Construction Co., 482 S.E.2d 558 (1997) (citing Jenkins v. Meares, 302 S.C. 142, 394 S.E.2d 317 (1990)). Furthermore, a legislative

enactment will be sustained against constitutional attack if there is "any reasonable hypothesis" to support it. Gary Concerete Products, Inc. v. Riley, 285 S.C. 498, 331 S.E.2d 335 (1985).

Courts view economic classifications with extreme deference and give them a heavy presumption of constitutionality. McMahan, at 550. "The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. F. S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920).

Appellant is not a member of a suspect class nor is a fundamental right implicated in any way. Appellant has not offered any evidence that it has been treated any differently than other employers who dispute the classifications assigned to payroll. For these reasons, neither procedural due process nor equal protection issues are implicated. Substantive due process would only be implicated if the pertinent statutes are not "rational" and it is clear beyond a reasonable doubt that the legislature acted arbitrarily and irrationally. Appellant has not met this burden.

The first constitutional challenge is that NCCI's system of classification set forth in the Manual is an improper delegation of executive power. However, the Manual is not related to any executive function. The executive branch of government is charged with enforcing the law, and only the Department has that enforcement role. NCCI does not collect premiums, prosecute fraud cases, or levy fines for non-compliance with regulations. NCCI is not involved in the function involved herein, which is an executive function. Thus, this argument is without merit.

More important, the South Carolina legislature has mandated by statute the use of a "nonpartisan rating bureau for workers' compensation" and requires each insurer, including this Respondent, to be a member. S.C. Code Ann. § 38-73-510 (Supp. 2001). NCCI is the nonpartisan rating bureau for workers' compensation of South Carolina and thirty-three other states, is the administrator of the assigned risk market in South Carolina, and files with the Department "every manual of classifications, rules, and rates, every rating plan, and every modification of any of these which it proposes to use" as required by S.C. Code Ann. § 38-73-520 (Supp. 2001). Since the Department can amend or reject the classifications and rules that Appellant challenges, there is no improper delegation of executive power to the nonpartisan rating bureau.

Appellant also argues that the "interchange of labor" rule contained in the Manual violates due process. Rule IV(E)(2) of the Manual addresses situations when an employee performs duties related to more than one classification. Appellant cannot show that this rule is not rational nor can Appellant show that it was developed in an arbitrary and irrational manner. Its employees cannot be separated into separate duties since the employees are performing both the lifeguard duties and the beach chair concession duties simultaneously. Their duties are unlike the lifeguards employed at a YMCA or at a club where that is their sole responsibility and other employees at that facility have other distinct and separate duties. For the carrier to request and for the Department to determine that the classification which most adequately addresses all the risks the insurer is covering is a rational conclusion. To the contrary, applying this rule is the most logical and rational means to address exposure in situations in which workers engage in several activities. In fact, if the "the interchange of labor" rule was not applied, there would be an arbitrary or unfounded result. Appellant does not meet its burden to show a violation of due process.

Finally, Appellant argues that S.C. Code Ann. § 38-73-495 is "unconstitutionally vague." However, equal protection is not implicated because the statute applies equally to any person or entity which disputes a classification. Also, due process is not implicated because Appellant cannot meet the burden of showing that the statute is irrational beyond a reasonable doubt. Thus, this argument is without substance and is meritless.

12

The statutory framework provides very objective criteria in determining whether a classification is properly applied. Premium rates for each classification are approved by the Department and classifications are described in detail in the Manual, which is presented to, considered by, and approved by the Department. The rates and classifications are developed by NCCI using actuarial methods. Since the rates and classifications are objectively derived, the criteria the Director considered–whether a previously approved rate or classification–do not violate due process nor are they "unconstitutionally vague."

As stated above, the issues raised by Appellant in its appeal are rejected. The letter by Mr. Kruger dated March 14, 1995, is not a "final agency decision." It was only an initial determination as made by many state agencies. Further, its argument that it should not have to pay for workers' compensation coverage for time its employees spent on lifeguard rescues since such was a small

fraction of the time spent on the beach each day by its employees is inconsistent with the purpose of insuring risks. One must pay for insuring a risk even though it is small. The risk still exists.

Appellant received notice of and participated in a full contested case/public hearing conducted by an agent of the Director. Further, Appellant had every opportunity to advocate its position, to call witnesses, to cross-examine witnesses, and to present evidence. The constitutional challenges also fail for the reasons stated herein.

ORDER

IT IS HEREBY ORDERED that the Final Order of the Director of the Department of Insurance dated July 25, 2001, is affirmed. The Class Code 9015 applies to Appellant's workers' compensation insurance premium effective June 1, 1999, the date the hearing officer issued its report based on the findings of the public hearing.

AND IT IS SO ORDERED.

MARVIN F. KITTRELL
Chief Administrative Law Judge

February 20, 2002
Columbia, South Carolina

13

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 20th day of February 2002

By: Kelly H Rainford
Judicial Law Clerk

STATE OF SOUTH CAROLINA	)	
	)	BEFORE THE DIRECTOR OF INSURANCE
COUNTY OF RICHLAND	)	
Lack's Outdoor Furniture, Inc.,	)	Docket Number: 96-003
	)	
Petitioner,	)	
	)	
vs.	)	ORDER
	)	
The Travelers Indemnity Company of Illinois,	)	
	)	
Respondents.	)	
	)	

This matter came before me on petition of Lack's Outdoor Furniture, Inc. (" Lack's ") to review a change in how certain of its payroll was classified for purposes of its worker's compensation insurance. The issue before the Department of Insurance is whether the payroll[1] of certain employees of Lack's and related companies were classified correctly pursuant to the Scope of Basic Manual Classifications ("Scopes Manual").[2] The classification assigned to payroll determines the premium rate that an employer pays for its worker's compensation insurance. For the reasons set forth below, the petition is denied, and I find that Class Code 9015 was correctly applied to the payroll at issue.

FACTUAL BACKGROUND

Lack's Outdoor Furniture, Inc., Lack's Beach Service, and North Beach Service (collectively "Lack's") are South Carolina corporations with their principal place of business in Horry County. It is owned by George W. Lack and Linda C. Lack and is engaged in the business of manufacture, sale, and leasing of beach related furniture, including wooden beach chairs,

[1] The specific payroll at issue is $445,618, which covers the majority of Lack's employees. Other payroll related to Lack's clerical, sales, and furniture assembly payroll is not at issue.

[2] The Scopes Manual was developed by the National Council on Compensation Insurance ("NCCI") to categorize certain types of activities for purposes of determining premium rate. The NCCI is the state authorized plan administrator of the South Carolina Assigned Risk Plan. This

beach umbrellas, cabanas, as well as other wooden furniture items. George and Linda Lack also own North Beach Service, Inc. and Lack's Beach Service, Inc.[3] In addition to the sale and lease of beach related furniture, Lack's provides lifeguard services on Myrtle Beach by franchise agreement with Horry County. Specifically, the agreement provides that Lack's "shall provide a full compliment of certified lifeguards at each franchise stand."

Lack's provides a beach service stand at each block in the more populated areas of Myrtle Beach. Each stand has one employee who is present from 8:00 am to 5:00 pm, seven days a week with a lunch break. The beach service employee sets up and takes down umbrellas and chairs, and during the day, rents the equipment, collects the rental fees, and turns it in to the company each evening.[4] Throughout the day, these employees also provide lifeguard services as required by the franchise agreement.[5] The franchise agreement provides that the employees must pass "Minimum Training on Rescue Procedures" before beginning work on the beach. In addition, all employees must wear the standard lifeguard uniform adopted by the City of Myrtle Beach, and each stand must fly a water safety flag.[6] Lack's income is derived solely from the equipment rental.[7]

Lack's has approximately 58 to 60 employees working in the beach services business. Lack's provides a beach service stand at each block of the more populated areas of Myrtle Beach and North Myrtle Beach. During the tourist season (approximately 216 days out of each year), each stand has one employee who is present from 8:00 am to 5:00 pm, seven days each week, with a lunch break.

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manual, along with others developed by the NCCI, has been submitted to and approved by the Department of Insurance. S.C. Code Ann. §38-73-500.

[3] Transcript, p. 7, p. 33.

[4] Transcript, p. 9.

[5] Transcript, p. 10, 34.

[6] Transcript, p. 34-38.

[7] Transcript, p. 10.

For approximately a seventeen year period, Lack's carried workers' compensation insurance through a number of carriers. The coverage rated the beach service employees under classification 8017. On May 21, 1992, Lack's applied for workers' compensation insurance in the assigned risk market, and Travelers was the assigned carrier with an effective date of June 29, 1992. On the application, Bob Betters, Lack's insurance agent, classified the payroll in Class Code 8017, which addresses "concessions – beach and umbrellas", but does not take into account any life guarding duties. The rate for Class Code 8017 is $1.83.[8] The application itself does not reference the life guarding duties performed by the employees or the franchise agreement between Lack's and the cities of Myrtle Beach and North Myrtle Beach.

In August 1994, Respondent Travelers submitted a Premium Adjustment Notice indicating that the class code of certain payroll would be changed to Class Code 9015, which addresses life guarding.[9] The rate for Class Code 9015 is $5.63.[10] This change resulted in a premium increase of approximately $21,000. By letter dated November 10, 1994, Lack's attorney wrote Dean Kruger, Assistant Actuary of the South Carolina Department of Insurance, disputing the application of Class Code 9015.[11] By letter dated March 14, 1995, Kruger indicated that the proper classification was Class Code 8017 based on the fact that there was "no lifeguard exposure for rating purposes."

On July 24, 1995, Ginger Stalnaker, account specialist for Travelers, again requested that the classification be changed, this time submitting two claims submitted by Lack's employees in connection with their life guarding duties. By letter dated September 3, 1995,

[8] Transcript, p. 17.
[9] Petitioner's Exhibit 5. See also Petitioner's Exhibit 3 for the complete description of both class codes at issue.
[10] Transcript, p. 17.
[11] Petitioner's Exhibit 6.

Kruger authorized Travelers to change the class code from 8017 to 9015. Lack's then filed this petition.

FINDINGS OF FACT

After careful consideration of the testimony and evidence presented at the hearing, I adopt the Findings in the Hearing Officer's Report:

1. That Lack's conducts a beach service business in South Carolina and employs approximately 60 people.
2. That the nature of Lack's beach service business includes a concession that sells and rents beach related furniture, including wooden beach chairs, beach umbrellas, and cabanas.
3. That in 1990 and 1992, Lack's entered into franchise agreements with the cities of Myrtle Beach and North Myrtle Beach.
4. That the franchise agreements provide that in exchange for granting Lack's the franchise to operate its business, Lack's must pay a franchise fee, provide trash pickup and life guard duties in its beach areas.
5. That franchise agreement provides that employees must pass "Minimum Training on Rescue Procedures" before beginning work on the beach and, in the City of Myrtle Beach, that all employees wear the standard life guard uniform adopted by the City of Myrtle Beach and that each stand must fly a water safety flag.
6. That during the tourist season (approximately 216 days out of each year), each stand has one employee who is present from 8:00 a.m. to 5:00 p.m., seven days each week, with a lunch break.

7. That each Lack's employee sets up and takes down umbrellas and chairs, rents the equipment, collects rental fees, turns in the fees each evening and throughout the day and the employees also provide life guard services as required by the franchise agreement.

8. That Lack's employees perform duties related to more than one classification as defined in the Scopes Manual: Class Code 8017 (beach chair concession) and Class Code 9015 (life guard duties).

9. That for approximately a seventeen year period, Lack's carried workers' compensation insurance through a number of carriers, which rated the beach service employees under classification 8017 as provided in the Scopes Manual.

10. That on May 21, 1992, Lack's applied for workers' compensation insurance in the assigned risk market, and Travelers was the assigned carrier with an effective date of June 29, 1992.

11. That on the application, Bob Betters, Lack's insurance agent, classified the payroll in Class Code 8017, which addresses "concessions – beach chairs and umbrellas," but does not take into account any life guarding duties and that the application itself does not reference the life guarding duties performed by the employees or the franchise agreement between Lack's and the cities of Myrtle Beach and North Myrtle Beach.

12. That in 1992, no claims for employee injuries sustained while performing life guard duties were submitted to Travelers.

13. That in 1993 and 1994, Lack's had one workers' compensation claim totaling $102.00, concerning an employee injury sustained while performing life guard duties.

14. That in August 1994, Travelers submitted a Premium Adjustment Notice indicating that the class code of the beach service employees would be changed to Class Code 9015, which addresses life guarding and this change resulted in a premium increase of approximately $21,000.00 per year.

15. That by letter dated November 10, 1994, to Dean Kruger, Assistant Actuary of the Department of Insurance, Lack's protested the Class Code change to 9015.

16. That NCCI conducted an inspection of Lack's work sites in February, 1995, and concluded that Lack's employees performed work classified as 9015.

17. That by letter dated March 14, 1995, Mr. Kruger indicated that the proper classification was Class Code 8017 based on the fact that there was "no life guard exposure for rating purpose", that the basis for this decision was the claims history of Lack's, and that neither Travelers nor NCCI requested a review of this determination by the Director of Insurance.

18. That by letter dated July 24, 1995, Ginger Stalnaker, account specialist for Travelers, made another request to change the classification, and submitted two claims made by Lack's employees in connection with their life guarding duties.

19. That by letter dated September 3, 1995, Mr. Kruger authorized Travelers to change the class code from 8017 to 9015.

20. That Lack's responded to Mr. Kruger by letter, and by letter of October 9, 1995, Mr. Kruger indicated that his decision was based on the data supplied by

Travelers and the appropriate recourse for Lack's would be to appeal the change in classification.

21. That Lack's did not receive notice of the requested change nor did it have an opportunity to be heard or participate in any sort of hearing process prior to the scheduled hearing.

CONCLUSIONS OF LAW

After careful consideration of the materials in the record, I conclude as follows: Petitioner's constitutional rights were not violated. I disagree. As an initial matter, Lack's is not a member of a suspect class nor is a fundamental right implicated in any way. Moreover, Lack's has not been deprived of any property since no premium has been collected using the higher rates associated with Class Code 9015. Nor has Lack's offered any evidence that it has been treated any differently than other employers who dispute the classifications assigned to payroll. For these initial reasons, procedural due process and equal protection issues are not implicated. Substantive due process would only be implicated if the pertinent statutes are not "rational," and it is clear beyond a reasonable doubt that the legislature acted arbitrarily and irrationally. Lack's simply has not met this burden.

Lack's first argues that holding evidentiary hearings before the Department of Insurance -- rather than the Administrative Law Judge Division -- denies Lack's its due process and equal protection. The South Carolina Administrative Procedures Act gives the Director and the Administrative Law Judge Division concurrent jurisdiction in insurance matters. *See* S.C. Code Ann. § 1-23-10 *et. seq.* (Supp. 2000) With respect to due process, the statute providing that the Department of Insurance initially hears this dispute is "rational" *per se* since the Department has the expertise to hear and determine issues related to classification issues. Notwithstanding, Lack's

will have the opportunity to have the matter heard by the Administrative Law Judge Division since S.C. Code Ann. 38-3-210 provides that an appeal of this matter may be taken to the Division for a final agency decision. Equal protection is not implicated since all disputed classification issues are heard by the Department of Insurance; Lack's is not treated any differently than other entities which may have disagreements regarding these issues.

Lack's also argued that NCCI's system of classifications set forth in the Scopes Manual is an improper delegation of executive power. South Carolina law permits the Director to consult outside sources for guidance on these issues. The Scopes Manual, however, is not related to any executive function. The executive branch of government is charged with enforcing the law, and NCCI plays no enforcement role in any regulation. NCCI does not collect premiums, prosecute premium fraud cases or levy fines for non-compliance with regulations. Since there is not an executive function involved in this matter, this argument must be rejected.

The next argument asserted by Lack's is that the Basic Manual's "interchange of labor" rule violates due process. The rule at issue -- Rule IV(E)2 of the Basic Manual for Workers Compensation and Employers Liability Insurance -- addresses situations when an employee performs duties related to more than one classification. It provides:

> Some employees, who are not miscellaneous employees, may perform duties related to more than one classification. When there is such an interchange of labor, the entire payroll of employees who interchange labor shall be assigned to the highest rated classification representing any part of their work.

Again, Lack's cannot show that this rule is not rational and was developed in an arbitrary and irrational manner. As indicated by Dave Cavanaugh at the hearing, payroll of Lack's employees cannot be segregated to take into account separate duties since employees are

performing their life guarding and beach chair concession duties simultaneously.[12] To use the classification which most adequately addresses the risk the insurer is covering is not "irrational beyond a reasonable doubt." To the contrary, the rule is the most logical and rational means to address exposure in situations in which workers engage in several activities. Lack's, therefore, cannot meet the burden necessary to show a violation of due process.

Lack's next claims that S.C. Code Ann. 38-73-495 denies Lack's due process and equal protection because it fails to provide "objective standards." Again, equal protection is not implicated because the statute applies equally to any person or entity which disputes a classification. Due process is not implicated because Lack's cannot meet the burden of showing that the statute is irrational beyond a reasonable doubt.

Regardless, the statutory framework provides very objective criteria in determining whether a classification is properly applied. Premium rates for each classification are approved by the Department of Insurance, and classifications are described in detail in the Scopes Manual, which is also presented to, considered, and approved by the Department. The rates and classifications are both developed by NCCI using actuarial methods. Since the rates and classifications are objectively derived, the criteria the Director should consider -- whether a previously approved rate or classification is "excessive, inadequate, or unfairly discriminatory" does not violate due process nor are they "unconstitutionally vague."

Lack's argues that Dean Kruger's September 3, 1995, and October 9, 1995, letters violate due process because it was "rendered without notice." In addition, Lack's asserts that Kruger's letters violate S.C. Code Ann. 38-73-495(3). Mr. Kruger's letters do not constitute a final

[12] Transcript, p. 107.

decision that binds the petitioner without opportunity for review. In fact, Lack's disputed these letters by the petition now before the Department upon which Lack's has been afforded a review.

The applicable insurance regulation clearly provides that a decision does not become final until the Chief Insurance Commissioner has reviewed exceptions, records, the presiding officer's report, and issues a written order. S.C. Ins. Reg. 69-31-ZZ. There are two reasons Ms. Clawson requested that the parties submit memoranda of law, findings of fact, conclusions of law and proposed orders at that time. First, Ms. Clawson reviewed the parties submissions before writing her official report, and in doing so heard Lack's objections to Mr. Kruger's initial findings. This report was then reviewed and considered by me before a final decision was rendered. Second, Ms. Clawson was following the required procedure as outlined in S.C. Ins. Reg. 69-31-XX. The purpose behind Ins. Reg. 69-31 is to provide parties before the Department with adequate procedural safeguards and an opportunity to be heard. Ironically, Lack's is using the very process which affords it procedural and substantive due process protections to complain of a lack of due process.

Lack's claims of due process violations were clearly not ripe at that stage of the proceedings. No premium had been collected as a result of Mr. Kruger's letters. Lack's had not suffered any erroneous deprivation, economic or otherwise, as a result of Mr. Kruger's letters. Rather, these letters simply served as an initial step in the process. It was the first step in the process.

Lack's has now participated in a hearing on the merits and has had the opportunity to present testimony, offer evidence, and submit a post-hearing brief and proposed order. If Lack's is dissatisfied with the decision of the Department, as detailed in this order, it has the opportunity and right to appeal to the Administrative Law Judge Division pursuant to S.C. Code Ann. §

38-3-210. If Lack's is dissatisfied with the decision of the Administrative Law Judge Division, it may appeal to the Circuit Court pursuant to S.C. Code Ann. § 1-23-380. The Circuit Court's decision can then be appealed to the South Carolina Supreme Court pursuant to S.C. Code Ann. § 1-23-390. Accordingly, the substantive and procedural safeguards afforded the petitioner are numerous. Lack's has not demonstrated a due process violation nor is there a violation of S.C. Code Ann. 38-73-495(3).

Finally, Lack's argues that the Department of Insurance violated S.C. Code Ann. 1-23-320 by virtue of the procedures used prior to Dean Kruger's September 3, 1995, and October 9, 1995, letters. S.C. Code Ann. 1-23-320 sets forth the procedure for notice and hearing in a contested case. Lack's misunderstands Mr. Kruger's role in defining the issues and the fact that these letters do not constitute a final decision from which no appeal could be taken. Assuming S.C. Code Ann 1-23-320 applies in this case, its provisions were followed in the Department's April 29, 1996, hearing. Petitioner was given proper notice and, in fact, appeared and participated in the hearing. For this reason, the Department did not violate S.C. Code Ann. § 1-23-320.

DECISION

As indicated by the undisputed testimony, pleadings, and exhibits introduced at the hearing, Lack's employees perform duties related to both beach chair concessions and life guarding. While the Scopes Manual does not specifically address ocean life guarding, it classifies life guarding in other contexts at Class Code 9015. I am persuaded by the testimony of Dave Cavanaugh, Underwriting Product Manager for NCCI,[13] who indicated that Class Code 9015 was most applicable to the life guarding duties performed by the Lack's employees.[14] Specifically,

[13] In its capacity as administrator of the South Carolina Assigned Risk Plan, NCCI serves as the actuarial rate making organization for South Carolina and other states. Pursuant to these roles, NCCI develops and presents to the Department of Insurance a number of manuals, including the Scopes Manual and the Basic Manual. One of Cavanaugh's duties is to maintain and update the Basic Manual. Transcript at p. 99.
[14] Transcript, p. 108.

therefore, I find that Lack's employees perform duties related to two classifications set forth in the Scopes Manual: Class Code 8017 (beach chair concession) and Class Code 9015 (lifeguard duties).

Rule IV(E)2 of the Basic Manual for Workers Compensation and Employers Liability Insurance ("Basic Manual") addresses situations when an employee performs duties related to more than one classification. It provides:

> Some employees, who are not miscellaneous employees, may perform duties related to more than one classification. When there is such an interchange of labor, the entire payroll of employees who interchange labor shall be assigned to the highest rated classification representing any part of their work.

In this case, Class Code 9015 is the higher rated of the two classifications at issue. Since Rule IV(E)2 provides that the highest rated classification "shall be assigned" to the entire payroll of employees who interchange labor, Class Code 9015 is the classification applicable to those employees of Lack's who perform both life guarding and beach chair concession duties.[15] As indicated by Dave Cavanaugh, payroll of Lack's employees cannot be separated to take into account the separate duties since employees are performing their life guarding and beach chair concession duties simultaneously.[16]

Lack's asserts two arguments for use of Class Code 8017: (1) the percentage of time spent by employees in water rescues is negligible compared to the percentage of time employees spend on chair and umbrella rental;[17] (2) few claims were submitted for water or rescue related incidents.[18] Neither argument is legally correct.

[15] Transcript, pp. 106-07.
[16] Transcript, p. 107.
[17] Transcript, p. 11-12.
[18] Transcript, p. 12-17.

Regardless of whether the actual time Lack's employees spent in water rescues, the undisputed testimony indicated that the employees -- by agreement with Horry County -- were on duty for eight hours per day and were responsible for water safety during the entire eight-hour period each day.[19] The fact that the lifeguards made few water rescues during this time period is not relevant.

Also irrelevant is the fact that few claims were filed for water-related incidents. The issue is the exposure that Traveler's is covering. The number of claims filed by an employer is not the determining factor in whether the exposure exists. The determining factor is what duties the employees are performing. In this case, it is undisputed that the life guarding exposure exists since Lack's employees are responsible for water safety on a daily basis.[20]

CONCLUSION

For the reasons stated above, I find that Class Code 9015 was correctly applied to the payroll at issue. By all accounts, the employees at issue performed two duties. This was confirmed in 1995 by the claims evidence submitted to the Department. Since Rule IV(E)2 of the Basic Manual provides that the highest rated classification "shall be assigned" to the entire payroll of employees who interchange labor, Class Code 9015 is the classification applicable to those employees of Lack's who perform both life guarding and beach chair concession duties.

Ernst N. Csiszar
Director, South Carolina Department of Insurance

Columbia, South Carolina

July 25, 2001.

[19] Transcript, p. 38.

[20] As the testimony of Dave Cavanaugh indicated, while the number of claims submitted is not relevant to the issue of classification, it is relevant to an insured's experience modification factor. In other words, if few claims are submitted for a particular exposure, the insured will be rewarded by developing a credit modification factor. Its premium will be reduced to take into account a safer workplace.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	BEFORE THE DIRECTOR OF INSURANCE
Lack's Outdoor Furniture, Inc., Petitioner, vs. The Travelers Indemnity Company of Illinois, and National Council on Compensation Insurance, Respondents.	)	Docket Number 96-003 Hearing Officer's Report

By Petition for Review dated October 23, 1995, Lacks Outdoor Furniture ("Lack's") appealed to the Director of Insurance for an order setting aside the decision of Dean Kruger, Assistant Actuary, as set out in his letters of September 3, 1995, and October 9, 1995. The Director of Insurance appointed me as Hearing Officer and this matter was heard at a Public Hearing on April 29, 1996.

In Lack's Petition for Review, it is alleged that Mr. Kruger's decision should be set aside for the following reasons: (1) that Mr. Kruger's decision is not supported by the evidence of record; (2) that Mr. Kruger's decision was rendered without notice to Petitioner that an action was pending and Lack's was given no opportunity to be hear, present evidence or participate in discovery; (3) that Mr. Kruger's decision is arbitrary and capricious; (4) that the hearing process before the Department of Insurance violates the Administrative Procedures Act; (5) that Mr. Kruger's decision did not comply with S.C. Code Ann. Section 38-73-495(3) (1976, as amended); and (6) that the hearing process before Mr. Kruger violated Lack's rights of due process.

The Respondent, Travelers Indemnity Company of Illinois, ("Travelers"), answered the Petition with a general denial and asserted that: (1) Lack's employees were properly classified pursuant to NCCI's Interchange of Labor Rule; (2) the Petition failed to state a claim upon which relief can be granted; (3) Mr. Kruger's determination does not result in a rate that is excessive, inadequate, or unfairly discriminatory; and (4) Lack's employees have not been incorrectly classified.

The issue before the Department of Insurance is whether payroll of certain Lack's employees and related companies were classified correctly pursuant to the Scopes of Basic Manual Classifications ("Scopes Manual"). The classification assigned to payroll determines the premium rate that an employer pays for its worker's compensation insurance. For the reasons set forth below, the petition is denied and I find that Class Code 9015 should be applied to the payroll at issue beginning at the date of this Hearing Officer's Report.

FACTS

Lack's Outdoor Furniture, Inc., Lack's Beach Service, and North Beach Service, (collectively "Lack's"), are South Carolina corporations with their principal place of business in Horry County. Lack's is owned by George W. Lack and Linda C. Lack and is engaged in the business of the sale and rental of beach related furniture, including wooden beach chairs, beach umbrellas, and cabanas. In addition to the sale and rental of beach related furniture and the sale of some refreshments, Lack's provides lifeguard services on Myrtle Beach and North Myrtle Beach pursuant to franchise agreements with those cities. Specifically, the agreement provides that Lack's "shall provide a full compliment of certified lifeguards at each franchise stand." The provision of lifeguard services is accomplished by having the beach service employee lifeguard qualified.

Lack's has approximately 58 to 60 employees working in the beach services business. Lack's provides a beach service stand at each block of the more populated areas of Myrtle Beach and North Myrtle Beach. During the tourist season (approximately 216 days out of each year), each stand has one employee who is present from 8:00 am to 5:00 pm, seven days each week, with a lunch break. The employee sets up and takes down umbrellas and chairs, rents the equipment, collects rental fees, and turns in the fees each evening. Throughout the day, the employees also provide lifeguard services as required by the franchise agreement. The franchise agreement provides that employees must pass "Minimum Training on Rescue Procedures" before beginning work on the beach and, in the City of Myrtle Beach, that all employees wear the standard lifeguard uniform adopted by the City of Myrtle Beach and that each stand must fly a water safety flag.

For approximately a seventeen year period, Lack's carried worker's compensation insurance through a number of carriers. The coverage rated the beach service employees under classification 8017. On May 21, 1992, Lack's applied for worker's compensation insurance in the assigned risk market, and Travelers was the assigned carrier with an effective date of June 29, 1992. On the application, Bob Betters, Lack's insurance agent, classified the payroll in Class Code 8017, which addresses "concessions - beach chairs and umbrellas", but does not take into account any life guarding duties. The application itself does not reference the life guarding duties performed by the employees or the franchise agreement between Lack's and the cities of Myrtle Beach and North Myrtle Beach.

In August, 1994, Travelers submitted a Premium Adjustment Notice indicating that the class code of the beach service employees would be changed to Class Code 9015, which addresses life guarding. This change resulted in a premium increase of approximately $21,000.00. By letter dated November 10, 1994, to Dean Kruger, Assistant Actuary of the Department of Insurance, Lack's protested the Class Code change to 9015. NCCI conducted an inspection of Lack's work sites in

February, 1995, and concluded that Lack's employees performed work classified as 9015. By letter dated March 14, 1995, Mr. Kruger indicated that the proper classification was Class Code 8017 based on the fact that there was "no lifeguard exposure for rating purposes." The basis for this decision was the claims history of Lack's. Mr. Kruger determined that although future claims may indicate otherwise, the proper classification was Class Code 8017. Neither Travelers nor NCCI requested a review of this determination by the Director of Insurance.

By letter dated July 24, 1995, Ginger Stalnaker, account specialist for Travelers, made another request to change the classification, and submitted two claims made by Lack's employees in connection with their life guarding duties. By letter dated September 3, 1995, Mr. Kruger authorized Travelers to change the class code from 8017 to 9015. Lack's did not receive notice of the requested change nor did it have an opportunity to be heard or participate in any sort of hearing process prior to the scheduled hearing. Lack's responded to Mr. Kruger by letter, and by letter of October 9, 1995, Mr. Kruger indicated that his decision was based on the data supplied by Travelers and the appropriate recourse for Lack's would be to appeal. Lack's then filed a Petition for Review.

FINDINGS OF FACT

After careful consideration of the testimony and evidence presented at the hearing, I make the following findings of fact:

1. That Lack's conducts a beach service business in South Carolina and employs approximately 60 people.
2. That the nature of Lack's beach service business includes a concession that sells and rents beach related furniture, including wooden beach chairs, beach umbrellas, and cabanas.

3. That in 1990 and 1992, Lack's entered into franchise agreements with the cities of Myrtle Beach and North Myrtle Beach.

4. That the franchise agreements provide that in exchange for granting Lack's the franchise to operate its business, Lack's must pay a franchise fee, provide trash pick-up and lifeguard duties in its beach areas.

5. That franchise agreement provides that employees must pass "Minimum Training on Rescue Procedures" before beginning work on the beach and, in the City of Myrtle Beach, that all employees wear the standard lifeguard uniform adopted by the City of Myrtle Beach and that each stand must fly a water safety flag.

6. That during the tourist season (approximately 216 days out of each year), each stand has one employee who is present from 8:00 am to 5:00 pm, seven days each week, with a lunch break.

7. That each Lack's employee sets up and takes down umbrellas and chairs, rents the equipment, collects rental fees, turns in the fees each evening and throughout the day, the employees also provide lifeguard services as required by the franchise agreement.

8. That Lack's employees perform duties related to more than one classification as defined in the Scopes Manual: Class Code 8017 (beach chair concession) and Class Code 9015 (lifeguard duties).

9. That for approximately a seventeen year period, Lack's carried worker's compensation insurance through a number of carriers, which rated the beach service employees under classification 8017 as provided in the Scopes Manual.

10. That on May 21, 1992, Lack's applied for worker's compensation insurance in the assigned risk market, and Travelers was the assigned carrier with an effective date of June 29, 1992.

11. That on the application, Bob Betters, Lack's insurance agent, classified the payroll in Class Code 8017, which addresses "concessions - beach chairs and umbrellas", but does not take into account any life guarding duties and that the application itself does not reference the life guarding duties performed by the employees or the franchise agreement between Lack's and the cities of Myrtle Beach and North Myrtle Beach.

12. That in 1992, no claims for employee injuries sustained while performing lifeguard duties were submitted to Travelers.

13. That in 1993 and 1994, Lack's had one worker's compensation claim totaling $102.00, concerning an employee injury sustained while performing lifeguard duties.

14. That in August 1994, Travelers submitted a Premium Adjustment Notice indicating that the class code of the beach service employees would be changed to Class Code 9015, which addresses life guarding and this change resulted in a premium increase of approximately $21,000.00 per year.

15. That by letter dated November 10, 1994, to Dean Kruger, Assistant Actuary of the Department of Insurance, Lack's protested the Class Code change to 9015.

16. That NCCI conducted an inspection of Lack's work sites in February, 1995, and concluded that Lack's employees performed work classified as 9015.

17. That by letter dated March 14, 1995, Mr. Kruger indicated that the proper classification was Class Code 8017 based on the fact that there was "no lifeguard exposure for rating purposes.", that the basis for this decision was the claims history of Lack's and that neither Travelers nor NCCI requested a review of this determination by the Director of Insurance.

18. That by letter dated July 24, 1995, Ginger Stalnaker, account specialist for Travelers, made another request to change the classification, and submitted two claims made by Lack's employees in connection with their life guarding duties.

19. That by letter dated September 3, 1995, Mr. Kruger authorized Travelers to change the class code from 8017 to 9015.

20. That Lack's responded to Mr. Kruger by letter, and by letter of October 9, 1995, Mr. Kruger indicated that his decision was based on the data supplied by Travelers and the appropriate recourse for Lack's would be to appeal.

21. That Lack's did not receive notice of the requested change nor did it have an opportunity to be heard or participate in any sort of hearing process prior to the scheduled hearing.

CONCLUSIONS OF LAW

1. That the Administrative Procedures Act applies in cases involving issues presented to the Department of Insurance.

2. That procedural due process addresses procedure and requires that certain procedural safeguards be observed before depriving an individual of property and that the fundamental protection provided by procedural due process is the opportunity to be heard at a meaningful time in a meaningful manner. United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) and Matthews v. Eldridge, 424 U.S. 319 (1976).

3. That substantive due process addresses the substance of the process and is considered more than a procedural safeguard and that it reaches those situations where a

deprivation of life, liberty, or property is accomplished by legislation which can, given even the fairest procedure in application to individuals, destroy the enjoyment of all three. Poe v. Ullman, 367 U.S. 497 (1961).

4. That the purpose of the Equal Protection Clause is to prevent the government from making improper classifications. McMahan v. International Association of Bridge, Structural & Ornamental Iron Workers, 858 F.Supp. 529 (D.S.C. 1994).

5. That the proper standard for evaluating the constitutionality of the class or right in this case is "mere rationality".

6. That Lack's is not a member of a suspected class nor is a fundamental right implicated.

7. That Lack's has not been deprived of any property since no premium has been collected utilizing the higher rate classification associated with Class Code 9015.

8. That Lack's has not been treated any differently than other employers who dispute the classification assigned to payroll.

9. That holding evidentiary hearings before the Department of Insurance does not deny Lack's due process or equal protection rights.

10. That all disputed classification issues are heard by the Department of Insurance.

11. That Lack's has not been denied equal protection under the law.

12. That NCCI plays no enforcement role in any regulation, i.e., NCCI does not collect premiums, prosecute fraud or levy fines for non-compliance.

13. That NCCI's system of classification as set forth in the Scopes Manual is not an improper delegation of executive power.

14. That Rule IV(E)2 of the Basic Manual for Worker's Compensation and Employers Liability Insurance ("Basic Manual") addresses situations when an employee performs duties related to more than one classification and provides that "Some employees, who are not miscellaneous employees, may perform duties related to more than one classification. When there is such an interchange of labor, the entire payroll of employees who interchange labor shall be assigned to the highest rated classification representing any part of their work".

15. That Rule IV(E)2 of the Basic Manual does not violate due process.

16. Insurance premium rates for each classification, as described in detail in the Scopes Manual which is presented to, considered by and approved by the Department of Insurance, are filed with and approved by the Department of Insurance.

17. That the rates and classifications are developed by NCCI using actuarial methods.

18. That the proper classification for Lack's employees is Class Code 9015.

19. That S.C. Code Ann. Section 38-73-495(2) (1976, as amended) gives the Department the power to "direct that a particular risk be classified in a particular classification upon a finding that a risk is classified incorrectly".

CONCLUSIONS

While the decisions of Mr. Kruger do not follow exact time lines, he did exhibit fairness in his initial review of the attempted re-classification and his subsequent decision to allow the re-classification. Nevertheless, the September, 1994, decision should not have been made absent a complete hearing on the merits, allowing both parties an opportunity to be heard. The hearing was ultimately held on April 29, 1996, allowing both sides to present testimony and evidence regarding

the two classification codes.

After a complete hearing on the merits, I find that Class Code 9015 should be applied to the payroll at issue. By all accounts, the employees at issue perform two duties. Since Rule IV(E)2 of the Basic Manual provides that the highest rated classification "shall be assigned" to the entire payroll of the employees who interchange labor, Class Code 9015 is the classification applicable to those employees of Lack's who perform both life guarding and beach chair concession duties. This classification is effective as of this date and shall be assessed from this date forward and not retroactively.

ALICIA K. CLAWSON
Deputy Director
Office of Licensing and Education Services and
Presiding Hearing Officer
South Carolina Department of Insurance

June 1, 1999